Cocoa Processors Sdn Bhd v United Malayan Banking Corporation Bhd & Ors (No 2)

HIGH COURT (PENANG) – SUIT NO 23-102-87
MOHAMED DZAIDDIN J
16 MAY 1988

Civil Procedure – Ex parte interim injunction to restrain defendants from disposing of and dealing with assets of plaintiffs – Application to set aside injunction – Injunction dissolved – Application for Erinford injunction pending appeal – Whether allowed

The learned judge had earlier allowed the defendants' applications discharging the ex parte interim injunction which had been granted against all the defendants (see [1988] 3 MLJ 491). Counsel for the plaintiff, upon his undertaking to file the notice of appeal against the learned judge's decision, then made an oral application under the *Erinford* principle for a further limited interim injunction pending the hearing of the appeal. The concern of the plaintiff was to preserve the status quo so that the appeal, if successful, would not be nugatory. Counsel for the defendants opposed the application.

Held, dismissing the application:

(1) There is no likelihood of a successful appeal being rendered nugatory.

(2) The balance of convenience lies in favour of the injunction pending appeal being refused.

(3) In the present case, damages seem to be a suitable and adequate remedy. The plaintiff would be adequately compensated in damages for the temporary damage between now and the date when the appeal is heard if the decision is reversed by the Supreme Court.

Case referred to

1 *Erinford Properties* v *Cheshire County Council* [1974] 2 All ER 448 (folld)

Charles Ong (*K Balasundaram* with him) for the plaintiff.
T Thomas (*Tunku Alina* with him) for the first defendant.
Juliana Solomon (*Miss*) for the second defendant.
Ghazi bin Ishak for the third, fourth, fifth and sixth defendants.

Cur Adv Vult

Mohamed Dzaiddin J: On 29 September 1987 and 22 February 1988, I heard submissions of counsel for the defendants on their applications to dissolve the ex parte interim injunction, which I granted, against all the defendants on 3 April 1987 restraining them from disposing, selling, dealing etc with the assets of the plaintiff's company through the third, fourth, fifth and sixth defendants who were appointed receivers and managers under the debentures. On 15 April 1988, I delivered my judgment allowing the defendants' application with costs.

Immediately thereafter, Mr Charles Ong, counsel for the plaintiff, upon his undertaking to file the notice of appeal against my above decision to the Supreme Court, moved orally for a further limited interim injunction pending the hearing of the appeal. Counsel stated that he was making the application under the principles in *Erinford Properties* v *Cheshire County Council*.[1] Quite naturally, Encik Ghazi who appeared for the defendants opposed the application. On 30 April 1988, I heard the arguments of counsel.

Mr Balasundaram, who appeared with Mr Charles Ong, submitted that I should exercise my discretion in allowing a further interim injunction pending an appeal for the following reasons. He stated that the concern of the plaintiff was to preserve the status quo pending the hearing of an appeal against my judgment, the notice of appeal having already been filed. Under the *Erinford*[1] principle, when a party is appealing, exercising his undoubted right of appeal, the court ought to see that the appeal if successful is not nugatory. Undoubtedly, counsel was conscious of my strong reasons for dissolving the ex parte interim injunction. Nevertheless, he felt that the likelihood of a successful appeal being rendered nugatory was a sufficient ground for me to grant the plaintiff's application. Counsel further submitted that the receivers would not be prejudiced by the interim injunction and in addition, the first and second defendants had a registered charge over the properties of the plaintiff. Lastly, he felt that there would be no greater hardship rendered to the defendants if the present application was allowed.

Tunku Alina, Miss Solomon and Encik Ghazi, in opposing the application, submitted mainly on the question of damages and balance of convenience, ie graver hardship to the defendants. Tunku Alina submitted that *Erinford*[1] was not a case in which damages seemed to be a suitable alternative unlike the present case. Miss Solomon submitted that since the appointment of the receivers and managers, the assets of the plaintiff company have depreciated considerably. The value of the plaintiff's factory and assets as a going concern as at 9 April 1985 was $10 million. But on the day the receivers and managers were appointed ie 24 April 1986, it was valued at $4.5 million. On the question of balance of convenience, both Tunku Alina and Miss Soloman submitted that as the appeal may take about six months before it is heard, the prejudice to the first and second defendants would far outweigh the convenience of the plaintiff. Lastly, Encik Ghazi submitted that the plaintiff had failed to show in what way, if the appeal is successful, it would render the judgment nugatory.

In *Erinford*,[1] reading from the headnote, on the plaintiffs' motion for an interlocutory injunction restraining the defendant from considering or determining the plaintiffs' planning application for certain land otherwise than concurrently with another planning application for adjoining land made by the other applicants, judgment was given refusing the injunction. Immediately after the judgment the plaintiffs moved the court ex parte for, and were granted, an injunction in a modified form restrain-

ing the defendant from considering the plaintiffs' planning application for some six days in order to enable the plaintiffs to consider an appeal. The defendant moved the court ex parte to discharge the injunction. Megarry J, in dismissing the motion, held that the court had jurisdiction to grant the injunction and that it was not inconsistent with a decision refusing an interlocutory injunction for the court subsequently to grant a more limited injunction preserving the status quo pending an appeal against that refusal. At p 454, Megarry J set out the principles on which a court should act when deciding whether or not to allow an application granting an injunction pending an appeal:

> There will, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on. But subject to that, the principle is to be found in the leading judgment of Cotton LJ in *Wilson* v *Church (No 2)* (1879-80) 12 Ch D 454 where, speaking of an appeal from the Court of Appeal to the House of Lords, he said, at p 458, '... when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.' That was the principle which Pennycuick J applied in the *Orion* case [1962] 1 WLR 1085 and although the cases had not then been cited to me, it was on that principle, and not because I felt any real doubts about my judgment on the motion, that I granted Mr Newsom the limited injunction pending appeal that he sought. This is not a case in which damages seem to me to be a suitable alternative.

Let me first highlight some salient points of the present case which may assist me in the exercise of my discretion. The plaintiff owed the first and second defendants substantial sums of money secured by the debentures. Upon its failure to pay all the outstandings, the first and second defendants proceeded to appoint receivers and managers over the properties and assets charged under the debentures. The plaintiff then commenced a civil suit against the defendants claiming damages for wrongful appointment of receivers and managers under the debentures. At the same time, it applied for an ex parte interim injunction, which was granted but later dissolved restraining the defendants from disposing, selling and dealing with its assets pending the hearing of the civil suit. In my written grounds of decision in dissolving the ex parte interim injunction I stated, inter alia, quite clearly that there was no serious question to be tried on the pleadings. I held that the receivers and managers were validly appointed. My decision is now pending appeal. Megarry J in *Erinford*[1] recognized that one of the factors in granting the application was the possibility that the judgment might be reversed or varied. I agree that this is an important factor in favour of the plaintiff. On the other hand, there are other considerations, eg 'where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on'. Therefore, considering the submissions of counsel from the point of view of the *Erinford*[1] principles, I find merits in the defendants' objection. Having considered the whole position of the case, I am of the view that whether or not the plaintiff succeeds in the appeal and in the main action will not be affected by its failure to obtain this further interim injunction. It must be remembered that the plaintiff's claim against the defendants is for damages for wrongful appointment of receivers and managers. The first and second defendants, being a commercial and merchant bank respectively, will no doubt satisfy any money judgment ordered by the court. Therefore, responding to Mr Bala's fear and anxiety on behalf of the plaintiff, I must say quite confidently that there is no likelihood of a successful appeal against my decision being rendered nugatory.

Secondly, a more serious issue to be considered here is the balance of convenience. Based on the facts and circumstances of the present case, I find the balance of convenience lay in favour of the injunction pending appeal being refused. I accept the submission of Miss Solomon that the assets of the plaintiff company had depreciated and the longer it remains in its present position, the greater the hardship being inflicted on the defendants. Further, in the event of the plaintiff's claim being dismissed, the assets having been depreciated quite considerably, the defendants may not be able to reap the fruits of their success under the debentures. On the other hand, should the plaintiff succeed in its claim ultimately, for damages, the defendants will have no difficulty in settling the judgment.

Lastly, I agree with Tunku Alina that in the present case damages seem to be a suitable and adequate remedy. The plaintiff would be adequately compensated in damages for the temporary damage between now and the date when its appeal is heard if my decision is reversed by the Supreme Court.

For the above reasons, I dismissed the plaintiff's application for a limited interim injunction pending appeal with costs.

Order accordingly.

Solicitors: *Skrine & Co*; *Rashid & Lee*; *Presgrave & Matthews*.

Reported by *Wong Kim Fatt*